No. _____

87-473

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

GENINA MARINE SERVICES, INC.,

Petitioner,

versus

MOBIL OIL EXPLORATION & PRODUCTION SOUTHEAST, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

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60 pp

QUESTION PRESENTED

A federal bankruptcy court decided that Petitioner could not recover certain assets from the bankruptcy trustee because those assets were the property of the debtor in the bankruptcy proceeding.

Later and with full knowledge of the bankruptcy court decision, a Louisiana court decided that Petitioner did not have a valid lien against Respondent's oil wells for the value of the same assets because those assets were the property of Petitioner.

The question presented is whether under the Supremecy Clause the state court was bound by the prior decision of the bankruptcy court on a matter within the exclusive jurisdiction of the bankruptcy court.

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Collier Bankruptcy Manual, Sec. 3.01(vii) 8

OPINIONS BELOW

The opinion of the Louisiana District Court is not reported and is contained in Appendix D. The opinion of the Louisiana Court of Appeal is reported at 506 S.2d 922 (1 Cir. 1987) and is contained in Appendix A.

The findings and conclusions of the U.S. Bankruptcy Court for the Western District of Louisiana is not reported and is contained in Appendix F.

JURISDICTION

On April 14, 1987, the Louisiana Court of Appeal, First Circuit, issued its notice of judgment and opinion. On June 12, 1987, the Louisiana Supreme Court denied Petitioner's application for certiorari (Appendix B) and the judgment became final on that date. Louisiana Code of Civil Procedure 2166(D).

The jurisdiction of the Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

Art. 1, Sec. 8, Cl. 4 of the Constitution provides:

> The Congress shall have power * * * To establish uniform laws on the subject of Bankruptcy throughout the United States; * * *.

Art. 6, Cl. 2 of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance

> thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 USC 1471(e) (now 28 USC 1334(d)) provides:

> The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

STATEMENT OF THE CASE

1. *Facts*

Petitioner owns four offshore utility boats. Petitioner made an arrangement with Briley Marine, Inc. to charter those boats to oil companies for use in oil exploration in the Gulf of Mexico. Briley chartered two of those boats to Respondent. Respondent paid the boat rent to Briley, but Briley spent the money for its own benefit and did not pay Petitioner.

Briley filed for reorganization under Chapter 11 of the Bankruptcy Code. At that time, Respondents still owed money to Briley for the use of Petitioner's boats.

In the bankruptcy proceeding, Petitioner filed suit against the Trustee to recover the boat rentals received from and owed by Respondent and by other oil companies who are not involved in this case. Respondent and the other oil

companies were not made parties. Petitioner claimed that it owned the boat rentals because Briley was its agent. The bankruptcy court rejected that claim and rendered a judgment "allowing the trustee to retain title and possession of all funds received or to be received by the trustee from third parties as a result of the use of the motor vessels owned by the plaintiff, Genina Marine Services, Inc." (Appendix E). In the court's findings and conclusions, it held that Petitioner and Briley had changed their relationship from principal-agent to creditor-debtor. (Appendix F). Petitioner did not appeal.

2. *Proceedings Below*

Petitioner then recorded a lien for $54,562 against the Respondent's oil wells serviced by Petitioner's boats. LA Rev. Stat. 9:4861, et seq. Because the oil wells were located on the Outer Continental Shelf, the Louisiana oil well lien statute was surrogate federal law. 43 USC 1333; *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 US 473 (1981).

Petitioner filed suit in Louisiana District Court for recognition and enforcement of the lien. Respondent pled the affirmative defense that the lien was invalid because Briley was Petitioner's agent and Respondent had paid Petitioner by paying Briley.

The parties filed cross motions for summary judgment. In support of its motion, Petitioner argued that, under 28 USC 1471, the U.S. Bankruptcy Court had exclusive jurisdiction over Briley's property. (R 52). Petitioner also filed a certified copy of the judgment and findings/conclusions of the bankruptcy court. (R 56). The District Court denied both motions without opinion.

The case was tried without a jury. Both the bankruptcy trustee and the chief executive officer of Briley testified for Petitioner. The judgment and findings/conclusions of the bankruptcy court were introduced in evidence. In pre-trial and post-trial briefs, Petitioner continued to argue that the District Court was bound by the bankruptcy court decisions because the bankruptcy court had exclusive jurisdiction over Briley's property under 28 USC 1471 and because the boat rentals were Briley's property under 11 USC 541. (R 115, 116). Respondent argued that the bankruptcy court judgment was not binding because not res judicata under Louisiana law.

The District Court rendered judgment in favor of Respondent. (Appendix C). In his reasons for decision, the District Court held that it was not bound by the bankruptcy court decision because Respondents were not a party and because the issue of apparent authority had not been decided. The court did not decide whether the bankruptcy court had exclusive jurisdiction over the boat rentals paid and owed to Briley. (Appendix D).

Petitioner appealed to the Louisiana Court of Appeals, First Circuit. Again Petitioner argued that the Louisiana Courts were bound by the bankruptcy court judgment, and that the judgment of the District Court violated the Supremecy Clause and the 14th Amendment. (Specification of Error No. 3). Nevertheless, the Court of Appeal affirmed the judgment. In its opinion, the Court of Appeal stated but did not decide the Supremecy Clause issue. Instead, it held that the bankruptcy court judgment was not res judicata under Louisiana law. (Appendix A).

Petitioner applied to the Supreme Court of Louisiana for a writ of certiorari. In that application, Petitioner argued that the Court of Appeal violated the Supremecy Clause

because the bankruptcy court had exclusive jurisdiction over the boat rentals. That application was denied.

The result of the bankruptcy court decision was that the boat rentals were the property of Briley. The result of the Louisiana court decisions is that the boat rentals were the property of Petitioner. The results are contradictory.

REASONS FOR GRANTING THE WRIT

The Louisiana Court of Appeal has decided an important question of federal law in a way which conflicts with the federal constitution and statutes, and with the decisions of this Court.

The question presented is whether under the Supremecy Clause a state court is bound by a prior decision of a bankruptcy court on a matter within the exclusive jurisdiction of the bankruptcy court.

1. The question is worthy of decision by this Court.

(a) This is an important federal question because it involves the supremecy of the authority of the federal courts. The Supremecy Clause states that federal law is the "supreme law of the Land" and that "the Judges in every State shall be bound thereby". The Bankruptcy Clause states that Congress has the power to establish "uniform laws" on bankruptcy. *Kuehner* v. *Irving Trust Co.*, 299 US 445 (1937). Congress exercised that power by granting to the federal courts the "exclusive jurisdiction" over the property of the debtor and by defining what is the property of the debtor. 28 USC 1471(e) (now 28 USC 1334(d)); 11 USC 541. May a state court ignore the decision of a federal court which exercised

that "exclusive jurisdiction"? The question goes to the heart of the federal system of government. The supremecy of federal authority in bankruptcy cases is at stake.

(b) The decision of the Louisiana Court of Appeal conflicts with the Supremecy Clause, the Bankruptcy Clause, and the bankruptcy laws as interpreted by this Court. The bankruptcy laws enacted by Congress have pre-empted the field and are the "supreme law of the Land". The Bankruptcy Clause not only grants power to the federal government but it also limits the power of the state governments. *Stellwagen* v. *Clum*, 245 US 605 (1918); *Int. Shoe Co.* v. *Pinkus*, 278 US 261 (1929). The subject matter of the bankruptcy power is the relationship between the debtor and his creditors. *Wright* v. *Union Cent. L. Ins. Co.*, 304 US 502 (1938). Congress may limit the jurisdiction of state courts over the property of the debtor. *Kalb* v. *Feuerstein*, 308 US 433 (1940). Here, the Louisiana Court of Appeal decided, in effect, that the federal statute granting "exclusive jurisdiction" over the power of the debtor's property was not "supreme law". That decision is inconsistent with the constitution and statutes as interpreted by this Court. How can the bankruptcy laws be "uniform" and "supreme" if state courts can ignore them? How can bankruptcy courts have "exclusive jurisdiction" over the property of the debtor, if state courts can exercise concurrent jurisdiction over the same property?

(c) The question presented goes beyond the facts of this case. The Bankruptcy Code and related statutes are relatively new laws, and lawyers and courts are struggling to apply them. A state challenge to the jurisdiction of the bankruptcy courts will cause great uncertainty.

(d) The question is important to the growth and administration of bankruptcy law. In *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982), this Court decided how power should be allocated to the federal district courts and their adjunct bankruptcy courts. This case gives the Court the opportunity to take the next step and decide whether that power is "exclusive" to the federal courts. Can the states circumvent the "exclusive jurisdiction" of the bankruptcy courts by applying the rules of res judicata? An authoritative decision by this Court will clarify bankruptcy law.

(e) Failure to decide this question will have an adverse effect on a substantial segment of society. Small businesses like Petitioner's will be prejudiced. Large corporations like Respondent can afford to sustain contradictory decisions like the ones in this case, but small business corporations cannot. The loss of the damages is increased by the costs of federal and state litigations.

(f) Denying the petition could be interpreted as a green light to chip away at the "exclusive jurisdiction" of the bankruptcy courts. It is very probable that litigants would try to use state courts to circumvent the jurisdiction of the bankruptcy courts.

*2. **The question should be decided now.***

(a) An immediate answer is important to several segments of the national economy. Unfortunately, bankruptcy is a common occurrence in oil and gas states like Louisiana. But hard times are not limited to the Oil Patch, and other geographical areas of the country are experiencing or will experience increased bankruptcies. The people affected by these proceedings need to know whether the bankruptcy court's jurisdiction is "exclusive", "uniform" and "supreme".

Attorneys must advise their clients and lower courts must make decisions. Delay in deciding this question will generate more litigation in state and federal courts.

(b) The question is ripe. Further delay will not elicit useful opinions by lower state or federal courts. The issues and the legal interests at stake are clear.

*3. **The question should be answered in this case.***

(a) This case is a good vehicle for answering the question. The facts are uncomplicated. The question is not fact bound. The record has been developed by state and federal judges. It is hard to imagine another case where the results and the reasoning are so contradictory.

(b) The fact that 28 USC 1471(e) was superceded by 28 USC 1334(d) does not complicate this case. "But for certain changes designed to cover gaps discovered in the predecessor, section 1334(d) is substantially identical to superceded 28 USC 1471(e)." *Collier Bankruptcy Manual*, Sec. 3.01(vii). Here, both statutes use the phrase "exclusive jurisdiction" over the debtor's property. The minor changes to 28 USC 1471(e) have no effect whatever on this case.

(c) The fact that the Louisiana courts did not explicitly decide the federal issue should not prejudice Petitioner. The decision on the federal issue is implicit in the judgment. Moreover, the Supremecy Clause would mean nothing if a state could circumvent it by refusing to apply supreme federal law and by refusing to explicitly decide the supremecy issue. Finally, it is very clear that at every stage of the state proceeding, the judgment and findings/conclusions of the bankruptcy court were brought to the state court's attention. The state court simply refused to be "bound" by the bankruptcy decision.

(d) The judgment cannot be supported by an independent state ground. The question presented is a jurisdictional question. If the bankruptcy court had "exclusive jurisdiction" over the boat rentals, then the state court had no jurisdiction over the boat rentals and the state judgment is a nullity.

4. The result in this case is very unfair.

The bankruptcy court decided that Briley owned the boat rentals. The Louisiana courts decided that Petitioner owned the boat rentals. The purpose of the Supremecy Clause was to prevent this kind of contradictory result.

CONCLUSION

The petition should be granted.

Dated: September 5, 1987

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APPENDICIES

APPENDIX A

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. CA 86 0298

GENINA MARINE SERVICES, INC.

VERSUS

MOBIL EXPLORATION &
PRODUCTION SOUTHEAST INC.

APR 14 1987
(stamp)

ON APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF ST. MARY, LOUISIANA, HONORABLE EDWARD A. DELAHOUSSAYE, III, JUDGE PRESIDING.

BEFORE: SAVOIE, CRAIN AND J. COVINGTON, JJ.

J. COVINGTON, Judge.

Genina Marine Services, Inc. (Genina) devolutively appealed the October 23, 1985 judgment dismissing its suit to recover monies allegedly owed by Mobil Oil Exploration & Production Southeast, Inc. (MOEPSI) and to declare valid Genina's lien and privilege on various oil producing properties, which was filed under La. R.S. 9:4861 et seq., The Louisiana Oil Well Lein Act. MOEPSI answered the appeal, requesting that "[t]he judgment of the trial court should be amended to hold, alternatively, that the Oilwell Leins, filed by Genina, which served as the basis for Genina's claim, were not timely filed and therefore, both were invalid."

Genina moved for summary judgment, claiming, inter alia, that there was no genuine question as to material fact that privilege had not prescribed and its liens were, accordingly, timely filed. MOEPSI filed a cross motion for summary judgment asserting that "[t]he liens are unenforceable because notice of the same was not recorded until more than one year after the completion date of the work for which the lien is claimed[,] a time well in excess of the 90 days expressed in . . . La. R.S. 9:4861 et seq. . . . ." The motions were heard on January 17, 1985 and both were denied. The court's minute entry reflects the denials and the notation "Written judgment to be submitted at a later date for the Court's signature." The record neither contains a formal judgment dismissing Genina's and MOEPSI's motions for summary judgment nor a minute entry that a judgment denying both motions, or either motion, was submitted to or signed by the judge. The judgment which is the subject of this appeal is silent on the matter of the timeliness of recordation the leins.

The trial court, in written reasons for judgment dated and filed September 25, 1985, stated the pertinent facts as follows:

> Certain facts are not in dispute. Genina . . . and Briley Marine [,Inc.] entered into a written management agreement on October 24, 1978 whereby Briley would manage four vessels owned by Genina. Briley then entered into an agreement with [MOEPSI] for the charter of these vessels. [MOEPSI] paid the monies due . . . Briley but Briley did not pay Genina. Subsequently Briley filed for bankruptcy under Chapter 11.
>
> In [an adversary proceeding in] the bankruptcy . . . , Genina contended the monies paid by [MOEPSI] to Briley were not assets

> of Briley but belonged to Genina since Briley was its agent. The Bankruptcy Court found . . . that [,] while the original relationship between Briley and Genina was that of an agent and principal, certain oral modifications changed the relationship to that of debtor-creditor. Under this finding, the Bankruptcy Court held that the monies paid by [MOEPSI] were assets of Briley and subject to control by the Bankruptcy Court.
>
> (Brackets supplied.)

After a thorough analysis of the testimony and documentary evidence, the trial judge found that Genina had clothed Briley with apparent authority to deal on Genina's behalf with third persons, into which category MOEPSI fit, and "since Genina may not deny agency [,] the effect of apparent authority is the same in this case as if such relations existed."

ASSIGNMENTS OF ERROR

Appellant assigns as errors the trial court's findings that:

1. Louisiana law, rather than federal maritime law, governed in determining the legal effect of the Genina-Briley management agreement, including MOEPSI's affirmative defense of payment;

2. The Bankruptcy Court's judgment in the adversary proceeding, brought in Briley's Chapter 11 Bankruptcy, holding that money paid by MOEPSI to Briley for the boat services Briley provided MOEPSI was Briley's money, was not binding on the state court in the instant case;

3. Genina had clothed Briley with apparent authority to deal with third persons on Genina's behalf in chartering the boats Genina owned; and

4. MOEPSI carried its burden of proving the affirmative defense of payment and that Genina, within contemplation of law, had been paid by MOEPSI's paying Briley for the boat services furnished by Briley under contract with MOEPSI.

FEDERAL MARITIME LAW APPLICABILITY

Appellant argues that: "[A]ll maritime contracts are governed by federal maritime law"; "who is a party to a maritime contract is a question of federal maritime law"; "by pleading that Briley was Genina's agent, [MOEPSI] is pleading that Genina is a party to the time charters . . . [which raises] a question of federal maritime law"; and "the district court erred by applying Louisiana law." Appellant contends that the question of whether federal or Louisiana law applies "is more than academic" because: (1) "[F]ederal maritime law is a national system"; (2) "[S]tate courts are bound by the decisions of federal courts"; and (3) "the U.S. Supreme Court only has jurisdiction to review the application of federal law by state courts."

Appellee, MOEPSI, succinctly and accurately restates appellant's argument as being "based upon the logic that since a charter of a vessel is a maritime contract and all maritime contracts are governed by the federal maritime law, the management contract must also be governed by the federal maritime law." Appellee straightforwardly labels appellant's argument as "without any foundation in either law or in fact" and argues, additionally that:

> [T]he Bankruptcy Court, in its reasons for judgment, in making its determination of the effect of the contract, relied upon a . . . Louisiana law and specifically three (3) Louisiana cases in reaching its conclusion. Fortunately, plaintiff's argument is academic since there is [no] "federal agency law" which can be used in determining this matter. A review of the federal cases shows that in the absence of federal agency law, courts look to the law of the pertinent state or to the [R]estatement of [A]gency. Accordingly . . . the law of Louisiana relating to agency . . . is the applicable law in this situation.
>
> (Brackets and elipsis supplied.)

The written reasons for judgment, which Bankruptcy Judge Rodney Bernard, Jr. assigned in the adversary proceeding in Briley's bankruptcy, offered into evidence by appellant in the instant case, contains the following pertinent findings of fact and conclusions of law:

> *Plaintiff [Genina] filed its initial complaint* on May 6, 1983, *alleging* among other things *that* defendant, *Briley* Marine, Inc., *was an agent for the plaintiff* and had received funds in its capacity as agent which plaintiff sought to recover from the debtor's estate.
>
> . . .
>
> [T]he court finds that . . . Briley . . . did agree to operate and manage [Genina's] three . . . motor vessels for . . . $5,000.00 per month during the year of 1978. This agreement [is dated October 24, 1978 and] was reduced to writing between the parties. . . .

The agreement is titled "Management Contract" . . . [and] [u]nder the terms of this agreement, Briley . . . was to find jobs for Genina['s] . . . motor vessels and to contract for said jobs in the name of Briley . . . who at the time was well known generally in the offshore boat business and was on an approved list for various oil companies seeking charters of motor vessels. As funds were received by Briley . . . from these charters, [they] were to be deposited in a special account designated and controlled exclusively by [Genina]. . . . [T]he written agreement between the parties was required to be executed a requisite part of a loan package by a lender of Genina . . . .

. . .

[T]he contract of October 24, 1978 . . . was]orally] modified in three (3) substantial ways during the term of the contract. The relationship . . . [evolved into one in which] Genina charged Briley for the use of its vessels on a monthly basis and Briley chartered the vessels to third parties invoicing . . . [them] for the use of the vessels during any given month for its own account . . . [and,] in turn Genina paid Briley a monthly fee for managing Genina's vessels.

While the parties might have intended [originally] by their written agreement to establish a principal-agent relationship, the relationship *became* that of debtor and creditor. Briley was excused from . . . [turning] over funds . . . to a bank [account] designated and controlled by Genina. Instead [Briley] was simply invoiced by Genina for

the use of Genina's vessels on a monthly basis.

. . .

. . . Although the original written contract . . . dated October 24, 1978 may have been intended to be that of an agency contract only, it is clear . . . that various oral modifications . . . [created] a new agreement . . . [under the terms of which Genina] would extend credit for the use of its vessels to [Briley, thus creat[ing] a creditor-debtor relationship between the parties.

. . . In the case at bar, there is no legal requirement that the original contract, the "Management Agreement," be in writing. The contract itself does not contain a provision that would exclude oral modifications between the parties. . . . [T]he *oral modifications made by the parties are sufficient to change the nature of the contract from that of an agency-principal type agreement to that of a debtor-creditor relationship.*

. . .

. . . [A]ll invoices prepared by [Briley] to third parties for the use of Genina's vessels and the payments received therefrom are property of the estate under 11 U.S.C. Sec. 541(a). *The definition of property of the estate is extremely broad and includes equitable as well as legal interests of the debtor. It certainly includes the debtor's accounts receivable.*

(Brackets, elipsis, and emphasis supplied.)

Appellee correctly asserts that the Bankruptcy Court relied on three Supreme Court of Louisiana cases as the basis for holding that the "Management Agreement" was subject to oral modification.

We agree with appellee that the trial court properly failed to apply a non-existing federal law of agency in interpreting the "Management Agreement." Accordingly, appellant's first assignment of error is without merit.

THE BANKRUPTCY JUDGMENT

Appellant argues (and it seems contradictory to us) that the Bankruptcy Court judgment decreeing Briley the owner of the accounts receivable is res judicata because: (1) federal law determines the effects of a federal judgment; (2) under federal law, both a party to a federal proceeding resulting in a judgment "and a person whose interests were represented are precluded from relitigating an issue decided in the federal proceeding"; (3) MOEPSI's "interests were represented [by Genina in the adversary proceedings in bankruptcy] because Genina contended that Genina owned the money"; (4) the bankruptcy judgment decreed Briley owned money paid by MOEPSI and other oil companies; and (5) the judgment that Briley owned the money applies to Genina, MOEPSI, "and the whole world." Arguing that the trial court's holding that the Bankruptcy Court's judgment was not res judicata and not binding on the state court "is repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Supremacy Clause, appellant asserts: "If Briley is the owner, then Genina was not paid by [MOEPSI]. If Briley does not own the money, then the money should have been delivered to Genina. This is an either-or situation. The U.S. Constitution will not permit the contradictory results in this case."

La. R.S. 9:4231, formerly designated as La. C.C. art. 2286, states the governing principles of res judicata, as follows:

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

Appellee argues that:

> [T]he judgment of the Bankruptcy Court cannot be res judicata since "the thing demanded" in the Bankruptcy Court is not the same, "the cause of action" is not the same, and certainly, the "parties" are not the same. . . . [MOEPSI] was not a party to the Bankruptcy Court [proceedings], and had no opportunity to participate in the proceedings, and was not even aware of the proceedings. Accordingly, this Court clearly has a right to determine whether or not there was an agency relationship created by the management contract, the intent, and the acts of the parties.

(Brackets and elipsis supplied.)

In *Swope v. St. Mary Parish School Board*, 256 La. 1110, 241 So.2d 238 (1970), *on rehearing*, the majority, in an opinion by the late Justice Albert Tate, Jr., recalled the writs previously issued and dismissed plaintiffs-relators' petition. Justice Tate stated that:

The *object of the demand sought to be enforced here* by these state proceedings–that the federal court was without authority to order the removal of this state court suit to it–*has been previously decided by final judgment in the federal proceedings to which the present litigants were parties. This judgment has become definitive* due to the failure of the plaintiffs to appeal it or seek other direct review. *Res judicata therefore precludes collateral state attack upon this prior federal judicial determination of the question.* See *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958).

As we noted in our original opinion, a long-settled and unbroken line of decisions so holds:

. . . If a federal court rejects a motion to remand a state proceeding removed to it, and its final judgment is not appealed, the federal judgment in the removed suit is conclusive upon the parties to it; this judgment is a bar to further proceedings in the state court. (United States Supreme Court citations omitted.)

The plaintiffs seek to evade the force of these authorities attempting to distinguish them. They point out that none of them concern instances where the party who removed the suit was not a party to the state suit as initially filed.

The important criteria for res judicata, however, does not concern this circumstance but, instead, whether there was an identity of parties *in the federal proceedings*, including

to the decision of the motion to remand filed there by the present plaintiffs.

All of the parties to this present state suit . . . were also parties to the decision and determination in federal court of the motion to remand filed there by the present plaintiffs. At the same time, the juridical facts asserted as *cause* or cause of action were the same as now . . . . Likewise, the object of this demand (the thing demanded) is the same at this stage in this state suit as that sought in the federal remand hearing . . . .

The prior federal judgment of dismissal, resultant from the federal court's denial of the plaintiffs' motion to remand, is now a definitive judgment, since not appealed and no longer appealable, ... *Since the requisite identities of (a) parties, (b) cause or cause of action, and (c) object of the demand (the thing demanded) are present between the present state proceeding and the prior federal determination, such latter determination has acquired the authority of the thing adjudged, i.e., is res judicata.*

The federal ruling is thus conclusive upon the parties to it. It now bars the plaintiffs from raising again before this court the identical demands previously rejected by such ruling.

241 So.2d at 246-247. (Emphasis in first and last paragraphs of the excerpt, parenthesis, and elipsis, are ours; other emphasis is Justice Tate's.)

In *American Mannex Corporation v. Rozands*, 462 F.2d 688 (CA 5, 1972), the Court, per Wisdom, C.J., affirmed the district judge's dismissal of tax payer's suit challenging the constitutionality of a Louisiana statute imposing ad valorem tax on their property as violative of the Import-Export Clause of the U. S. Constitution. Previously the taxpayers had contested, in state court, the levy of the same tax on the same property, raising the same constitutional objection. The federal district court held that "the federal suit was barred by the earlier state court determination of the constitutional issue between these same parties . . . not . . . as a matter of res judicata, but . . . under the Louisiana doctrine of 'judicial estoppel.' " 462 F.2d at 689. Judge Wisdom reasoned, in pertinent part, that:

> *When the parties and the cause of action litigated are the same in state court as in federal court, the doctrine of res judicata has been held to bar federal relitigation,* even if a federal constitutional question is in dispute. (citations omitted.) *Similarly*, it has been held that *disputed factual or legal issues arising between the same parties cannot be relitigated in federal court after a valid state court determination of the same issues.* The principle may be described as one of "judicial estoppel" in Louisiana, (citations omitted); or "collateral estoppel" in other states. (citations omitted.) But the result is the same. In accordance with 28 U.S.C. §1738, the federal court follows the state rule of repose.
>
> 462 F.2d at 690. (Emphasis and parenthesis supplied.)

The record fails to establish that MOEPSI was made a party to the adversary proceeding in Briley's bankruptcy, either by Genina's complaint or by interpleader filed by Briley's trustee or any other creditor of Briley. Thus, a necessary element for according res judicata effect of the Bankruptcy Court's judgment in the state court proceedings was conspicuously missing. Appellant's second assignment of error is without merit.

AGENCY

The trial court reasoned, in pertinent part, that:

> Two requirements must be met for the doctrine of apparant authority to apply. First the principal must make some form of manifestation to an innocent third party. Secondly the third party must rely reasonably on the purported authority of the agent as a result of the manifestation.
>
> . . .
>
> . . . Genina knew Briley was engaged in chartering Genina's vessel[s] to [MOEPSI] and did not attempt to stop [Briley]. . . . Genina was aware of the charter agreement between Briley and [MOEPSI] and that [MOEPSI] knew that the vessels were owned by Genina.
>
> The second part of that test is also met because [MOEPSI] relied on this acquiescence to enter into the charter agreement. This reliance was reasonable. [MOEPSI's] personnel knew the owners of Genina . . . very well and [Genina] did not object to Briley chartering its vessels. It was reasonable for them to assume that Briley was Genina's agent.

> Apparent authority does not create an actual agency relationship, (citation omitted); but is a principal (sic) of estoppel which operates in favor of third persons like [MOEPSI]. . . . Therefore, since Genina . . . may not deny agency[,] the effect of apparent authority is the same in this case as if such a relationship existed.
>
> . . .
>
> The facts are undisputed that [MOEPSI] paid Briley . . . the money owed. Since apparent authority clothed Briley . . . with an agency-like relationship, payment to Briley . . . had the same legal consequence as payment to Genina . . . . This Court finds that [MOEPSI] has met its burden of proving its affirmative defense of payment. The Court finds that payment was made . . . .
>
> . . .
>
> The Bankruptcy Court's judgment is based solely on its appreciation of the terms of the written agreement between Briley and Genina, *not the effect such modifications would have on third persons*. There is no evidence that [MOEPSI] ever knew about the subsequent oral modifications upon which the Bankruptcy Court based its judgment.
>
> (Parenthesis, brackets, emphasis, and elipsis supplied.)

AAA Tire & Export, Inc. v. Big Chief Truck, 385 So.2d 426 (La.App. 1st Cir. 1980), relied upon by the trial court in the instant case, states the applicable principles as follows:

An actual agency is a contract between the principal and agent[,] created either expressly or by implication.

An agency is created expressly by the oral or written agreement between the parties. It is created by implication when, from the nature of the principal's business and the position of the agent within that business, the agent is deemed to have permission from the principal to undertake certain acts which are reasonably related to the agent's position and which are reasonable and necessary concomitants of the agent's express authorization. Implied authority connotes permission from the principal for the agent to act, though that permission is not expressly set forth orally or in writing. Generally, one should look from the viewpoint of the principal and the agent to determine whether the agent has implied authority.

The concept of *apparent authority* only comes into play *when the agent has acted beyond his actual authority and has no permission whatsoever from his principal to act in such a manner.* The principal will be bound for such actions if he has put his agent in such a position or has acted in such a manner as to give an innocent third person the reasonable belief that the agent has authority to act for the principal. The facts and circumstances of each case must be examined to determine the reasonableness of the third party's belief. One must look from the view point of the third person to determine whether an apparant agency has been created. In transactions between

> businessmen, the nature of the business and the customs and usages within the trade can be important factors to be considered.
>
> 385 So.2d at 429. (Brackets, elipsis, and emphasis supplied.)

The "Management Agreement" entered into between Genina and Briley, evidenced by the written instrument dated October 24, 1978, created an actual agency. The record supports this conclusion. Whether oral modifications of the managment agreement changed the relationship of Genina and Briley from that of principal-agent to creditor-debtor is immaterial insofar as MOEPSI is concerned. The record supports MOEPSI's contentions that its dealing with Briley, combined with several face-to-face conversations between the owners of Genina and MOEPSI's personnel concerning increased rental for the use of Genina's vessels being managed or hired out by Briley to MOEPSI, were conducted in good faith and on the basis of a reasonable reliance that Briley had Genina's authority to continue managing its boats. MOEPSI was never made aware of any oral modifications of the "Management Agreement," did not have its suspicions aroused that oral modifications may have taken place which might have detracted from Briley's previously conferred express authority, and was never requested by Genina to alter its method of paying for the use of the boats (including, but not limited to, issuing its checks made payable to Genina and Briley jointly), or any other disclosure which would have alerted MOEPSI that something was amiss.

We differ with the trial court only in one respect. The trial court held an apparent authority was created by Genina's actions taken as a whole. We hold that an express agency was created by the "Management Agreement" at the very

outset. Insofar as MOEPSI is concerned, that agency relationship never ceased and was not modified by Genina and Briley. For the latest expression of the Louisiana Supreme Court on the concept of apparent authority, see *Boulos v. Morrison*, Docket No. 86-C-1817 (Slip Opinion, February 23, 1987).

Justice Watson, for the court, in *Boulos*, observed, in pertinent part, that:

> Mandate is an act by which one person, a principal, gives power to another, an agent, to transact for him and in his name one or several affairs. LSA-C.C. art. 2985. *An agent's power or authority is composed of his actual authority, express or implied, together with the apparent authority which the principal has vested in him by his conduct.* . . . As between principal and agent the limit of the agent's authority to bind the principal is governed by the agent's actual authority. *As between the principal and third persons, the limit of an agent's authority to bind the principal is governed by his apparent authority.* . . . . Apparent authority is a judicially created concept of estoppel which operates in favor of a third party seeking to bind a principal for the unauthorized act of an apparent agent.
>
> For the doctrine of apparent authority to apply, the *principal must first act to manifest the alleged agent's authority to an innocent third party*. Second, *the third party must rely reasonably on the manifested authority of the agent*. . . . [T]he principal will be bound for the agent's actions if the principal has

> given an innocent third party a *reasonable belief* the agent has authority to act for the principal. . . . The burden of proving apparent authority is on the party relaying on the mandate.
>
> A *third party* seeking to benefit from the doctrine of apparent authority *may not blindly rely upon the assertions of an agent*. He has a duty to inquire into the nature and extent of the agent's power.
>
> Slip Opinion, pp. 4 and 5. (Brackets, elipsis, and emphasis supplied.)

The greater includes the lesser. We hold the record establishes that an actual agent-principal relationship was created by written contract, which was subsequently modified orally. Thus, the record establishes that, at the very least, Briley possessed apparent authority to bind Genina up until the time Briley filed for protection under Chapter 11 of the Bankruptcy Act and the fact of such filing was communicated to entities and persons who had a business relationship with Briley.

Appellee, MOEPSI, carried its burden of proving the mandate of agency. Thus, payment to Genina's agent was, in contemplation of law, payment to Genina for the use of the motor vessels.

"Where there is credible evidence before the trier of fact, which furnishes a reasonable factual basis for the trial court's conclusion, an appellate court should not reverse unless the trial court is clearly wrong." *Boulos*, supra, Slip Opinion, p. 5; *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978); *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973).

Our thorough review of the record of this proceeding convinces us that the trial court did not commit manifest error. Enough credible evidence was adduced which furnished a reasonable facutal basis for the trial court's conclusion.

Appellant's third and fourth assignments of error are without merit.

The record supports the trial court's conclusion that payment to Briley was, in contemplation of law, payment to Genina, thus MOEPSI owed nothing more to Genina. Having concluded the MOEPSI owed nothing to Genina, we expressly hold (and the trial court impliedly held) that Genina's liens have no legal effect whatsoever. We deem it unnecessary to address the issue of the timeliness of the filing of the leins under The Louisiana Oil Well Lein Act, La. R.S. 9:4861, et. seq.

For the foregoing reasons, the judgment of the trial court is affirmed. Appellant is cast for all costs of this proceeding, including the appeal. La. C.C. art. 2164.

AFFIRMED.

APPENDIX B

The Supreme Court of the State of Louisiana

NO. 87-C - 1112

GENINA MARINE SERVICIES, INC.

VS.

MOBILE OIL EXPLORATION &
PRODUCTION SOUTHEAST, INC.

IN RE: Genina Marine Services Inc.; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA86 0298; Parish of St. Mary 16th Judicial District Court Div. "C" Number 72,750

June 12, 1987

Denied.

JCW
JAD
WFM
JLD
HTL
LFC

Supreme Court of Louisiana
June 12, 1987

s/s Frans J. LaBranche, Jr.
Clerk of Court
For the Court

APPENDIX C

16TH JUDICIAL DISTRICT COURT
PARISH OF ST. MARY
STATE OF LOUISIANA

NUMBER 72,750

GENINA MARINE SERVICES, INC.

VERSUS

MOBIL OIL EXPLORATION &
PRODUCING SOUTHEAST, INC.

JUDGMENT

This case was tried on April 29, 1985. Present were: H. P. Rowley, III, attorney for Genina Marine Services, Inc., plaintiff, and Philip J. McMahon, attorney for Mobile Oil Exploration & Producing Southeast, Inc., defendant. Testimony was received and other evidence adduced and presented; and thereafter, the case was then taken under advisement by the Court.

The Court, after consideration of all of the evidence adduced and concluded that the law and evidence are in favor of the defendant, Mobil Oil Exploration & Producing Southeast, Inc., and for reasons set forth in the written Reasons for Judgment rendered and signed on September 25, 1985.

IT IS ORDERED, ADJUDGED AND DECREED that:

I. There be judgment rendered herein in favor of defendant Mobil Oil Exploration & Producing Southeast, Inc. and against the plaintiff, Genina Marine Services, Inc., dismissing plaintiff's demands, with prejudice, at plaintiff's costs.

JUDGMENT RENDERED and signed in Chambers at Franklin, Louisiana, this 23rd day of October, 1985.

s/s Edward A. Delahoussaye, III
EDWARD A. DELAHOUSSAYE, III, JUDGE

RECEIVED AND FILED
OCT 23, 1985
s/s Laura Wesfatte
Dy. Clerk of Court
(stamp)

APPENDIX D

16TH JUDICIAL DISTRICT COURT
PARISH OF ST. MARY
STATE OF LOUISIANA

NO. 72,750

GENINA MARINE SERVICES, INC.

VS.

MOBIL EXPLORATION

REASONS FOR DECISION

This is a suit to recover monies allegedly due and to enforce the Louisiana Oil Well Lien Statute (RS 9:4861 et seq.). Trial was held on April 29, 1985, evidence was adduced and the case was taken under advisement pending submission of post-trial briefs.

Certain facts are not in dispute. Genina Marine and Briley Marine entered into a written management agreement on October 24, 1978 whereby Briley would manage four vessels owned by Genina. Briley then entered into an agreement with Mobil Oil Exploration for the charter of these vessels. Mobil paid the monies due to Briley but Briley did not pay Genina. Subsequently Briley filed for bankruptcy under Chapter 11.

In the bankruptcy action, Genina contended the monies paid by Mobil to Briley were not assets of Briley but belonged to Genina since Briley was its agent. The Bankruptcy Court found, that while the original relationship between Briley and Genina was that of an agent and principal, certain

oral modifications changed the relationship to that of debtor-creditor. Under this finding, the Bankruptcy Court held that the monies paid by Mobil were assets of Briley and subject to control by the Bankruptcy Court.

These facts are all undisputed. The contested issue that must be resolved is whether or not Mobil has met its burden of proving its affirmative defense of payment. (LCCP 1005)

Mobil's position is that Genina "clothed" Briley with apparent authority. Genina contends that the Bankruptcy Court's finding that Briley was not Genina's agent is conclusive.

It should be noted here that the Bankruptcy Court did *not* decide its case with Mobil Oil as a party. It's decision rested solely on bankruptcy law and its appreciation of Louisiana's substantive law relating to modification of a written agreement. It did not discuss whether or not Mobil Oil believed Briley was Genina's agent nor if that issue if of central importance to this Court.

Mobil advances two possible basis for agnecy between Briley and Genina. First, express agency—where the third party dealing with an agent is aware of the agreement between the principal and the agent. Secondly, apparent authority—where the third party is led to believe that an agency relationship exists due to some action on the part of the principal to "clothe" the apparent agent with authority. It is clear from reading the Bankruptcy Court's Judgment that these issues were never addressed. The Bankruptcy Court's judgment is based solely on its appreciation of the terms of the written agreement between Briley and Genina, not the effect such modifications would have on third persons. There is no evidence that Mobil Oil ever knew about the subsequent oral modifications upon which the

Bankruptcy Court based its judgment. Therefore, since this issue was never discussed the Bankruptcy Court's finding is not res Judicata. See LCC 2286.

This Court believes that a relationship existed between Briley and Genina because of the apparent authority given to Briley by Genina Marine. Two requirements must be met for the doctrine of apparent authority to apply. First the principal must make some form of manifestation to an innocent third party. Second the third party must rely reasonably on the reported authority of the agent as a result of the manifestation. *Bamber Contractors* Vs. *Morrison Engineering*, 385 So.2d 327, 330 (1st Cir. 1980).

> Actual authority exists when the principal grants authority to the agent either by express or implied consent. Apparent authority arises when the principal acts in such a way that third persons are justified in assuming the agent has certain authority, even though the principal may not have granted the authority to the agent. The principal is then estopped to deny the existence of an agency relationship.
>
> "The expression 'apparent authority', as well as its variant, 'ostensible authority', has been defined as connoting that authority which a principal holds his agent out as possessing or permints him to exercise or to represent himself as possessing under such circumstances as to estop the principal from denying its existence."
>
> Apparant authority is not mentioned in our Civil Code but has been jurisprudentially

> recognized as agency by estoppel. It arises when the principal, by his acts or conduct, has knowingly caused or permitted another to appear as his agent to the injury of third parties who have acted in good faith and with reasonable prudence.
>
> The principal will be bound for the agent's actions if the principal has acted in a manner so as to give an innocent third party the reasonable belief the agent has authority to act for the principal. (citations ommitted) *Thompson* V. *Great Midwest Fur Co.* 395 So2d 840, 843 (1st Cir. 1981)

The first requirement of the two prong test is met because Genina knew Briley was engaged in chartering Genina's vessel to Mobil and did not attempt to stop them. In fact, Genina's owners knew the Mobil Oil personnel who were handling the vessels and visited them on several occasions to discuss the matter. Genina was aware of the charter agreement between Briley and Mobil and that Mobil knew that the vessels were owned by Genina. (The fact that the agreement between Briley and Mobil called Briley "owner" is not conclusive because paragraph nine (9) defines "owner" as *Briley* - owner is a term of art in the contract not a conclusion of law.)

The second part of that test is also met because Mobil relied on this acquiescence to enter into the charter agreement. This reliance was reasonable. Mobil's personnel knew the owners of Genina Marine very well and these owners did not object to Briley chartering its vessels. It was reasonable for them to assume that Briley was Genina's agent.

Apparent authority does not create an actual agency relationship, *Pailet* vs. *Guillory* 315 So2d 893, (3rd Cir. 1975); but is a principal of estoppel which operates in favor of third persons like Mobil. *Broadway* Vs. *Alstar Insurance*, 385 So2d 536 (La. 1973).

> Equitable estoppel (as distinguished from promissory estoppel with which we are not concerned here) arises when one by his actions, or by his silence when he ought to speak, induces another to believe certain facts and the other relies on these facts to his prejudice. In the law of agency, estoppel does not require knowledge or consent by the principal as to the unauthorized acts of his agent. *Ledoux* V. *Old Republic* 233 So2d 731, (3rd 1970)

> Equitable estoppel arises when one by his actions, or by his silence when he ought to speak, induces another to believe certain facts and the other relies on these facts to his prejudice. The estoppel is designed to foster justice by preventing the first party from taking a position contrary to his prior conduct. *Bamber* AT 331

Therefore, since Genina Marine may not deny agency the effect of apparent authority is the same in this case as if such a relationship existed.

The Court further states that it is aware of the decision of the First Circuit Court of Appeals in the case of American Supply Company of Morgan City, Inc. V. Genina Marine Services, Inc., 470 So.2d 964 (La. App. 1 Cir. 1985). In that

case the Appellate Court affirmed a decision of this Court (Fleming, J.), which, under the facts of that case, held that,

> "It is quite clear that an agency relationship was established by which Briley Marine made purchases on open account on behalf of Genina as principal and with Briley Marine as Geninas' agent",
> (Ibid, 470 So.2d 964, 965)

While the holding in the cited case is not controlling here, the facts and parties are similiar and are persuasive, particularly as it relates to the agency relationship between Briley and Genina.

The facts are undisputed that Mobil Oil paid Briley Marine the money owed. Since apparent authority clothed Briley Marine with an agency-like relationship, payment to Briley Marine had the same legal consequence as payment to Genina Marine. This Court finds that Mobil Oil has met its burden of proving its affirmative defense of payment. The Court finds that payment was made and gives judgment in favor of Mobil Oil.

Thus Done and Signed, in Chambers, in Franklin, Louisiana, this 25th day of September, 1985.

s/s Edward A. Delahoussay, III
EDWARD A. DELAHOUSSAYE, III, JUDGE

CLERK'S OFFICE, FRANKLIN,
SEP 26 1985
A true copy of the original
Attest s/s Laura Wesfatte
Dy. Clerk of Court
(stamp)

RECEIVED AND FILED
SEP 25 1985
s/s Laura Wesfatte
Dy. Clerk of Court
(stamp)

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

CASE NO. 483-00100-LO

ADVERSARY NO. 483-0107

F I L E D

NOV 18 1983

MARTHA M. CARLTON, CLERK
UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT of LOUISIANA
(stamp)

IN RE:

BRILEY MARINE, INC.

Debtor

GENINA MARINE SERVICES, INC.

Plaintiff

VERSUS

BRILEY MARINE, INC. and
CHARLES N. WOOTEN, TRUSTEE,

Defendants

JUDGMENT

The court after considering the pleadings, testimony, documentary evidence, and exhibits for the reasons stated in its Findings of Fact and Conclusions of Law, renders judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Genina Marine Services, Inc. and against the trustee, Charles N. Wooten and Briley Marine, Inc., in the full sum of Eleven Thousand Thirty-Four and 29/100 ($11,034.29) Dollars plus legal interest from date of judicial demand until paid, representing the amount due plaintiff as administrative costs in this proceeding.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendants, Charles N. Wooten, Trustee and Briley Marine, Inc., and against the plaintiff, Genina Marine Service, Inc., allowing the trustee to retain title and possession of all funds received or to be received by the trustee from third parties as a result of the use of the motor vessels owned by the plaintiff, Genina Marine Services, Inc.

IT IS FURTHER ORDERED that the sum of Ninety Five Thousand Eight Hundred Ninety-Six and 50/100 ($95, 896. 50) Dollars owed by the debtor to the plaintiff, Genina Marine, on the date the Chapter 11 petition was filed represents an unsecured claim of the creditor, Genina Marine.

IT IS FINALLY ORDERED, ADJUDGED AND DECREED that the preliminary injunction heretofore issued herein is hereby dissolved.

All costs of these proceedings are to be paid in equal proportions by the parties.

Signed this 18th day of November, 1983 at Opelousas, Louisiana.

s/s Rodney Bernard, Jr.
RODNEY BERNARD, JR.

UNITED STATES BANKRUPTCY JUDGE

COPY SENT

Date 11-18-83
By: Chin
To: Rowley
Sandoz
Wooten
Castle
(stamp)
(names penned in)

APPENDIX F

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

CASE NO. 483-00100-LO

ADVERSARY NO. 483-0107

F I L E D

NOV 18 1983

MARTHA M. CARLTON, CLERK
UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT of LOUISIANA
(stamp)

IN RE:

BRILEY MARINE, INC.,

Debtor

GENINA MARINE SERVICE, INC.,

Plaintiff

VERSUS

BRILEY MARINE, INC. AND
CHARLES N. WOOTEN, TRUSTEE,

Defendants

FINDINGS OF FACT

Plaintiff filed its initial complaint on May 6, 1983, alleging among other things that defendant, Briley Marine, Inc., was an agent for the plaintiff and had received funds in its capacity as agent which plaintiff sought to recover from the debtor's estate. The complaint was subsequently amended to specifically allege that the defendant, Briley, filed its original petition seeking relief under Chapter 11 of the Bankruptcy Code on February 4, 1983 and was continued as a debtor in possession until the defendant trustee was appointed on May 6, 1983.

The plaintiff sought and obtained a preliminary injunction on May 16, 1983 enjoining the defendants from spending, disbursing, transferring or otherwise using all of the money which the debtor received as the purported agent of Genina Marine, and which the trustee had in his possession, until the merits of this complaint could be heard. On May 25, 1983 the trustee filed an answer and counter-claim alleging among other things that the plaintiff in the original complaint, Genina Marine, was indebted to the debtor for various sums of money resulting from contractual obligations that were the subject of the original complaint and alleging that the defendants were entitled to the benefit of offset for such sums as were undetermined at the time of filing the answer and counter-claim. Additionally, defendants claimed that the plaintiff was a creditor of the estate and as such had received a preference of one (1) or more payments within ninety (90) days of the filing of the voluntary petition for relief under Chapter 11. The defendant trustee further claimed that the preliminary injunction caused damage to the estate and sought recovery for the same. A hearing on the merits was held July 19, 1983.

The issues which the court must resolve based upon the evidence presented in these proceedings are as follows:

(1) What agreement, if any, existed between the parties concerning their relationship;
(2) What sums of money, if any, were owed by each party to the other; and
(3) Did the plaintiff receive any transfer of property from the debtor which could constitute a preference within the meaning of the Bankruptcy Code.

On the first issue, the court finds that the defendant, Briley Marine, did agree to operate and manage plaintiff's three (3) motor vessels for a specified fee of $5,000.00 per month during the year of 1978. This agreement was reduced to writing between the parties and was introduced as plaintiff's exhibit P-1, which is dated October 24, 1978. The agreement is titled "Management Contract". Under the terms of this agreement, Briley Marine was to find jobs for Genina Marine's motor vessels and to contract for said jobs in the name of Briley Marine, Inc., who at the time was well known generally in the offshore boat business and was on an approved list for various oil companies seeking charters of motor vessels. As funds were received by Briley Marine from these charters, the same were to be deposited in a special account designated and controlled exclusively by the plaintiff. For the service of obtaining charters for Genina's vessels, Briley was to receive initially a management fee of $5,000.00 per month. The evidence further shows that the written agreement between the parties was required to be executed as a requiste part of a loan package by a lender of Genina Marine Services, Inc.

From October 24, 1978, until February 4, 1983 when the voluntary petition seeking relief under Chapter 11 of the Bankruptcy Code was filed, the written management agreement between the parties was orally modified in the following particulars:

(1) Briley did not send funds received for the use of Genina's vessels to any particular bank designated and controlled exclusively by Genina. Genina Marine agreed, according to Mr. Wilson B. Kornegary, Sr., its President, to this arrangement so long as Briley would remit to Genina its check for the gross revenues received by Briley for the use of the vessels. In the course of time, a system of invoicing between the parties was devised whereby Briley would send an invoice to the company chartering the vessels at the end of each month for the charter fees and Genina would in turn invoice Briley for a like amount for the use of the vessels. Genina did not pay Briley its monthly fee as contemplated in the written management agreement, but would withhold the payment over a period of time since Briley would owe its money for the use of Genina's vessels. The court finds this oral modification of the written contract established a debtor-creditor relationship between the parties.

(2) During the entire time of the agreement between the parties, Briley operated other motor vessels for third parties and for its own account which appears contrary to the non-competition convenant contained in the written agreement. According to the testimony of Mrs. Aggie R. Kornegay, wife of the President of Genina Marine, this was perfectly alright with them as long as Genina's owners desired to continue their relationship with Briley, knowing full well that it operated boats in competition with Genina's, simply

because the services of a management firm were needed desparately at the time Briley was employed. In the words of Mrs. Kornegay:

"Question: Why did you need Briley?
Answer: Well, we had no one to run the business. We were in a quandry so to speak. My daughter was killed. There was no one to run the business. My son was in college. Bright couldn't no longer—had no actual contact with oil companies. I knew nothing about the business, so hiring Mr. Briley was like—it was a gift from heaven."

The courts finds that the written contract was modified by Genina's acquiescence to Briley's acts of chartering other vessels for third parties and for its own account while at the same time performing like services for Genina.

(3) The contract was again modified in March 1982 according to the testimony of Wilson B. Kornegay, Jr. in that Genina added another vessel to its fleet under the management contract and Briley agreed to include this vessel under the contract for an additional fee of $500.00 per month making the total fee $5,500.00 for the management of four (4) vessels.

From the evidence presented, the court finds that the contract of October 24, 1978 existing between the parties

and couched in the terms of a "Management Contract" for the vessels of the owner, Genina, was modified in three (3) substantial ways during the term of the contract. The relationship between the parties was one whereby Genina charged Briley for the use of its vessels on a monthly basis and Briley chartered the vessels to third parties invoicing said third parties for the use of the vessels during any given month for its own account. In turn, Genina paid Briley a monthly fee for managing Genina's vessels.

While the parties might have intended by their written agreement to establish a principal-agent relationship, the relationship became that of debtor and creditor. Briley was excused from any provision to turnover funds in kind to a bank designated and controlled by Genina. Instead, it was simply invoiced by Genina for the use of Genina's vessels on a month to month basis. The second substantial modification was that Genina acquiesced in Briley providing services for other owners of motor vessels and for its own account. Thereby excusing Briley from the non-competition convenant of the written agreement dated October 24, 1978. The reason for this acquiescence was simply because Briley had the means for obtaining work for Genina's vessels and Genina needed to continue that relationship in an ongoing fashion. The fees which were paid to Briley were also modified during the term of the contract and were increased from $5,000.00 per month to $5,500.00 per month beginning in March of 1982.

The court now addresses the issue to be resolved concerning what amounts, if any, are due by each party to each other. The evidence consists of the testimony of Ms. Cathy Simon, a certified public accountant, employed by Briley Marine prior to the filing of the Chapter 11 proceeding. Ms. Simon testified concerning the authenticity of the invoices that were contained in the debtor's books and

accounts prior to the filing of the Chapter 11 proceeding. Additionally, Ms. Simon prepared a work sheet showing that the debtor, Briley did in fact invoice and collect from third parties certain sums both prior to and after the filing of the Chapter 11 proceeding for the use of the Genina fleet of motor vessels. Ms. Simon testified in reviewing Exhibit "P-10" which was a work paper prepared by her that on February 4, 1983, the date the Chapter 11 petition was filed, that Briley Marine had indeed collected $118, 675.00 from certain third parties for the charter of Genina's vessels and these funds had not been paid over to the plaintiff, Genina. In addition, Ms. Simon testified that the debtor in possession did in fact collect an additional $37,231.28 following the filing of the Chapter 11 petition. The debtor did not remit those funds to the plaintiff, Genina. Ms. Simon further indentified the debtor's check to Genina dated January 11, 1983 in the sum of $8,000.00 as a partial payment on the Genina invoice number 1084 to the debtor.

Mr. Jim Exner, an accountant employed by the trustee, testified that he examined the work papers of Ms. Simon, the invoices between the parties, and the respective checks between the parties. He identified a summary exhibit prepared by him that was uncontradicted by any other evidence and appears in typewritten from as Exhibit "D-4". In addition, the entire work file of Mr. Exner was also introduced into evidence. He testified that according to his examination of the debtor's books on November 4, 1982, (a date ninety [90] days prior to the filing of the Chapter 11 petition; a significant date due to the allegations of preferential payments) the defendant, Briley, owed Genina Marine, $150, 680.16. On the same date, Genina owed Briley the sum of $59,090.78; leaving a net difference owed by Briley to Genina of $91,589.38.

On February 4, 1983, the date the Chapter 11 proceeding was filed, a reconciliation of the debtor's business records show that Briley owed Genina $173,618.78. On the same date Genina owed Briley $77,722.28; leaving a net difference owed by Briley to Genina of $95,896.50. The net amount owed by Briley to Genina increased by $4,307.12 from a date ninety (90) days prior to the filing of the petition until the petition was filed on February 4, 1983.

Testimony further reveals that Genina's invoice number 1094 that was shown to be outstanding on November 4, 1982, was in fact paid in kind to Genina by Briley on December 9, 1982, in the sum of $8,367.66. Genina also received partial payment of its invoice number 1084 in the amount of $8,000.00, resulting in the balance shown to be due on November 4, 1982, in the sum of $23,250.00 to be reduced by said partial payment to the sum of $15,250.00, outstanding on February 4, 1983. This court finds that the plaintiff, Genina, had an ongoing business relationship with the defendant, Briley. This relationship existed as a creditor (Genina) extending credit to a debtor (Briley) on a continuing daily basis resulting in the debtor, Briley, owing Genina the net sum of $4,307.12 more at the time the Chapter 11 proceeding was filed than it did ninety (90) days prior thereto.

Following the date the Chapter 11 proceeding was filed and while the debtor operated as a debtor in possession in February and the debtor in possession was billed by Genina on its invoice number 2227 for said use in the sum of $16,100.00. The debtor in possession, Briley, as was customary, billed third parties for this use. During the same period of time, Genina was billed by Briley for its February management fee and for service work represented by its invoice number 2273 and 2269 in the aggregate amount of $5,065.71.

The court finds that the debtor in possession whose office was succeeded by the trustee owes to Genina the net sum of Eleven Thousand Thirty-Four and 29/100 ($11,034.29) Dollars as an adminstrative expense of doing business by the debtor in possession. The court futher finds that any sums received by the debtor in possession in payment of its invoices to third parties following the filing of the Chapter 11 proceedings are in fact property of the estate and are to be retained in full ownership by the trustee. This same finding in effect applies to such outstanding receivables in the hands of the trustee that are due from third parties for the use of the motor vessel, My Joe and Vesper, during the month of February, 1983.

The court further finds that the payments from the debtor to Genina either in kind or by check during the ninety (90) days preceding the Chapter 11 filing represent payments on a continuing business relationship between the parties in the ordinary course of business and are not considered preferences because the net effect of these payments did not reduce the indebtedness due the plaintiff by the debtor during the ninety (90) day period preceding the filing of Chapter 11. On the contrary, the plaintiff extended new credit to the debtor in the net amount of $4,307.12. The court concludes as a matter of fact that the debtor did owe the plaintiff, Genina, the sum of $95,896.50 on the date the Chapter 11 petition was filed and the same represents an unsecured claim.

CONCLUSIONS OF LAW

From the foregoing facts the court makes the following conclusions of law as the same relate to these proceedings. Although the original written contract between the parties dated October 24, 1978 may have been intended to be that of an agency contract only, it is clear to the court that various oral modifications were subsequently made and

acted upon by the parties in such a manner that a new agreement came into existence. The new agreement, whereby the plaintiff would extend credit for the use of its vessels to the defendant created a creditor-debtor relationship between the parties.

It is clear under Louisiana law that a written contract may be modified and amended by a subsequent parol agreement, provided the original contract was not required to be in writing. *Huey Lumber and Millwork Inc. v. Jackson*, 212 So.2d 538 (La. 1968); *Christ v. Christ*, 251 So.2d 197 (La. 1971); *Lawson v. Donohue*, 313 So.2d 263 (La. 1975); *Southern Scrap Material Co. v. Commercial Scrap Materials Corporation*, 239 La. 958, 120 So.2d 491 (1960). In the case at bar, there is no legal requirement that the original contract, the "Management Agreement", be in writing. The contract itself does not contain a provision that would exclude oral modifications betweeen the parties. We therefore conclude that the oral modifications made by the parties are sufficient to change the nature of the contract from that of an agency-principal type agreement to that of a debtor-creditor relationship.

The court further concludes that the aforementioned modified contract was an "executory contract" at the time these proceedings in Chapter 11 were instituted. An executory contract, while not defined in the Bankruptcy Code, has been described in the legislative history of Section 365 of Title 11 as "generally includ[ing] contracts on which performance remains due to some extent on both sides". H. R. Rep. No. 595, 95th Cong., 1st Sess. 347 (1977); S. Rep. No. 989, 95th Cong., 2d Sess., 58 (1978). *Accord, In re American Magnesium Co.*, 488 F.2d 147, 152 (5th Cir. 1974) (a contract is executory where both parties have ongoing commitments); *Jenson v. Continental Financial Corp.* 591 F.2d 477, 481 (8th Cir. 1979) (a contract is executory

where obligations of the debtor and the other contracting party remain partially and materially unperformed); *In re Knutson*, 563 F.2d 916, 917 (8th Cir. 1977) (a contract is executory where both sides have substantial obligations to perform). Under the Code, the definition of executory contract remains the same. *In re Alexander*, 670 F.2d 885 (9th Cir. 1982); *In re Sun Ray Bakery, Inc.*, 5 B.R. 670 (Bkrtcy. D. Mass. 1980); *In re California Steel Co.*, 24 B.R. 185, 187 (Bkrtcy. N. D. Ill. 1982); *In re O.P.M. Leasing Services, Inc.*, 23 B.R. 104, 117 (Bkrtcy. S. D. N.Y. 1982); *In re Monsour Medical Center*, 11 B.R. 1014 (Bkrtcy. W. D. Pa. 1981); *In re Rovine Corp.*, 6 B.R. 661 (Bkrtcy. W. D. Tenn. 1980).

An executory contract is also property of the debtor's bankruptcy estate. See, Fogel, *Executory Contracts and Unexpired Leases in the Bankruptcy Code*, 64 Minn. L. Rev. 341, 343 (1980). See also *Darby v. Atkinson (In re Ferris)*, 415 F.Supp. 33 (W. D. Okla. 1976).

We conclude that all invoices prepared by the debtor to third parties for the use of Genina's vessels and the payments received therefrom are property of the estate under 11 U.S.C. Sec. 541(a). The definition of property of the estate is extremely broad and includes equitable as well as legal interests of the debtor. It certainly includes the debtor's accounts receivable.

Accordingly, the court finds that the trustee may retain as property of this estate all pre-petition accounts receivable and the sum of $37,231.28 which the debtor received after the filing of the Chapter 11 petition. Additionally, the trustee may retain any other funds invoiced by the debtor for the use of Genina's motor vessels during the month of February, 1983. The trustee must, however, pay unto Genina Marine Services, Inc. the sum of Eleven Thousand Thirty-Four

and 29/100 ($11,034.29) Dollars, representing the net due the plaintiff for the use of its vessel during February, 1983, after offsetting the amount due Briley by Genina for its February management fee and service work.

The court finally concludes that Genina Marine may retain the two (2) payments it received within ninety (90) days preceding the filing of the Chapter 11 proceeding by the debtor. These payments ordinarily might be subject to recovery by the trustee, however, 11 U.S.C. Sec. 547(c)(4), provides as follows:

> "(c) The trustee may not avoid under this section a transfer – (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor - - -"

In this instance, the court concludes that the plaintiff, Genina, continued to extend new value to the debtor, Briley, up until the date of the filing of the Chapter 11 petition. Such payments as the trustee seeks to recover come within the net effect rule stipulated in Section 547 of the Bankruptcy Code.

No evidence was introduced by the trustee to substantiate any claim for damages as a result of the preliminary injunction granted upon the plaintiff's motion and therefore have been found or will be allowed.

Judgment will be signed in accordance with these findings of fact and conclusions of law.

Signed this 18th day of November, 1983 at Opelousas, Louisiana.

s/s Rodney Bernard, Jr.
RODNEY BERNARD, JR.

UNITED STATES BANKRUPTCY JUDGE

COPY SENT

DATE **11-18-83**
By: **Chin**
TO: **Rowley**
Sandoz
Wooten
Castle
(stamp)
(names penned in)